Supreme Court, U.S.
FILED
NOV 9 2001
OFFICE OF THE CLERK

(31)

No. 00-1751

In The

Supreme Court of the United States

SUSAN TAVE ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION OF OHIO, ET AL.,
Petitioners,

v.

DORIS SIMMONS-HARRIS, ET AL.,
Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE VERMONTERS FOR BETTER EDUCATION IN SUPPORT OF PETITIONERS

MICHAEL D. DEAN

Attorney For Amicus Curiae

Dean & McKoy, S.C.
20975 Swenson Drive
Suite 125
Waukesha, WI 53186
(262) 798-8044

15 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

INTEREST OF AMICUS CURIAE 1

INTRODUCTION 1

I. THE CLEVELAND PROGRAM DOES NOT ENDORSE RELIGION. 3

A. Aid Flowing Directly to Children and Families Rather than to the Religious Schools They Choose to Attend Does Not Endorse Religion. 3

B. Selective Prohibition of Aid to Religious Schools Sends a Message of Disfavor Prohibited by the Establishment Clause. 5

II. THE CLEVELAND PROGRAM DOES NOT HAVE THE PRIMARY EFFECT OF ADVANCING RELIGION. 6

A. Justice O'Connor's Deciding Concurrence in *Mitchell v. Helms* Reaffirmed the Constitutionality of the "Private Choice" Mechanism Approved in *Witters* and *Zobrest*. 6

B. Excluding Religious schools Under Program of Generally Available Aid Is Unconstitutional. 8

C. The Sixth Circuit's Percentage Test Is Unconstitutional and Irrational 9

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Agostini v. Felton, 521 U.S. 203, 117 S.Ct. 1997 (1997) 8

Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 115 S.Ct. 2440 (1995) 3

Committee for Public Education v. Nyquist, 413 U.S. 756, 93 S.Ct. 2955 (1973) 6, 7

Lynch v. Donnelly, 465 U.S. 668, 104 S.Ct. 1355, (1984) ..... 3 - 5

Marks v. United States, 430 U.S. 188, 97 S.Ct. 990 (1977) 6

Mitchell v. Helms, 530 U.S. 793, 120 S.Ct. 2530 (2000) 4, 6, 7, 10

Mueller v. Allen, 463 U.S. 388, 103 S.Ct. 3062 (1983) 8

Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995) 4, 5, 7

Simmons-Harris, et al. v. Zelman, et al., 234 F.3d 945 (6th Cir. 2000) ..... *passim*

Witters v. Washington Dept. of Servs. for Blind, 474 U.S. 481, 106 S.Ct. 748 (1986) 4, 6, 7

Zobrest v. Catalina Foothills School Dist.,
509 U.S. 1, 113 S.Ct. 2462 (1993) 6, 7

Zorach v. Clauson, 343 U.S. 306,
72 S.Ct. 679 (1952) 2, 9, 10

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. I ..... *passim*

INTEREST OF AMICUS CURIAE[1]

Vermonters for Better Education, Inc. ("VBE") is a nonprofit organization dedicated to improving educational options for all children in the state of Vermont. Vermont is one of only two states that offers local school districts the option of providing tuition to all resident high school students to attend the private or public schools outside the district in lieu of operating district public schools. VBE strongly supports legislation providing parents the opportunity to choose the best schools available for their children's education without discrimination based on religion.

INTRODUCTION

In its decision below, the Sixth Circuit concluded that the Ohio Pilot Project Scholarship Program violated the Establishment Clause because, in the court's opinion, the percentage of students attending religious schools (82%) was unacceptably high. *Simmons-Harris, et al. v. Zelman, et al.*, 234 F.3d 945, 959 (6th Cir. 2000). The court concluded that the high percentage resulted from the Ohio legislature's providing scholarships at the approximate tuition rate charged by religious schools. That rate was almost $5,000.00 per year less than per-pupil expenditures in public schools, and created a significant disincentive against public schools accepting Program students. In fact, no public schools participated *Id.*, 234 F.3d at 959.

The court therefore concluded that the Program "would

---

[1] The parties have consented to the filing of this brief. Copies of the letters of consent are filed with the Clerk of the Court herewith. This brief was authored by counsel for *amicus curiae* and was not authored or contributed to by counsel for a party or by any other person or entity, either in whole or in part. Costs of submission of this brief in this Court have been underwritten by *amicus curiae*.

approve the actual diversion of government aid to religious institutions in endorsement of religious education . . . ." *Id.*, 234 F.3d at 960. In essence, the court found the Program unconstitutional because religious schools competed too efficiently with public schools. Put another way, the court found that the Establishment Clause prohibited the Ohio legislature from authorizing scholarships in an amount equal to the market cost of private education.

As discussed below, even though the court tied the Program's constitutionality directly to the percentage of students enrolled in religious schools, it did not even acknowledge, much less consider, the elementary "real world" factors that resulted in those percentages. The court simply ignored the obvious question why religious schools' ability to provide superior education at lower cost should render a program unconstitutional.

Perhaps most troubling of all, defendants did attempt to present evidence of students enrolled in public schools or non-religious private schools under other programs, which would have dramatically lowered the relative percentage of students attending religious schools. *Id.*, 234 F.3d at 958. The court's narrow focus obviously dictated only one possible conclusion, yet it excluded the "bigger picture" as "irrelevant."

In contrast to the Sixth Circuit's arbitrary, flawed methodology which was inherently antagonistic to religious schools, this Court should employ a methodology "that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach v. Clauson*, 343 U.S. 306, 313, 72 S.Ct. 679, 684 (1952). The Establishment Clause should reflect a principled interpretation for the people's *protection*, not a vindictive "search and destroy" against students' freely choosing religious education.

I. THE CLEVELAND PROGRAM DOES NOT ENDORSE RELIGION.

A. Aid Flowing Directly to Children and Families Rather than to the Religious Schools They Choose to Attend Does not Endorse Religion.

The Establishment Clause prohibits "government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." *Lynch v. Donnelly*, 465 U.S. 668, 688, 104 S.Ct. 1355, 1367 (1984) (O'Connor, J. concurring, citations omitted).

Whether impermissible endorsement exists is determined from the viewpoint of a "reasonable observer." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 779 - 80, 115 S.Ct. 2440, 2445 (1995) (O'Connor, J., concurring in part and concurring in judgment). VBE respectfully suggests that the reasonable observer's viewpoint in this case is that of Cleveland's students and parents drowning in a failed school system, not that of the rarified, detached luxury exercised by the Sixth Circuit panel whose children will never stare into the abyss of poverty and for whom their decision has no direct, personal consequence. Were their children drowning in the same sea of failure as the parents and children of Cleveland, the Scholarship Program would look very much like a life preserver. They would not mistake it for a rosary.

Two principles require that the "reasonable observer" be well informed of the plight of the families involved in the Program. First, "[T]he reasonable observer in the endorsement inquiry must be deemed aware of the history and context" of the Program. *Id.* As to "history," Cleveland has struggled for decades with tragic failure by poor and minority children.

During that time the idea of "educational choice" has struggled to overcome extraordinary political opposition from state and local governments which have tried literally every other option. Thus, a "reasonable observer" would view the Cleveland program not as an "endorsement" of nonpublic schools or of religious schools in particular, but rather as a means of last resort.

As to "context," the Program does not endorse religion because it focuses on the children and families themselves, not on the schools which they attend.

> Second, I believe the distinction between a per-capita school-aid program and a true private-choice program is significant for purposes of endorsement. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 692, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (O'CONNOR, J., concurring). In terms of public perception, a government program of direct aid to religious schools based on the number of students attending each school differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools.

Mitchell v. Helms, 530 U.S. 793, 842, 120 S.Ct. 2530, 2559 (2000) (J. O'Connor, concurring.) The Court also said in *Rosenberger v. Rector and Visitors of the Un. of Virginia*, 515 U.S. 819, 115 S.Ct. 2510 (1995), "The aid to religion at issue here is the result of petitioner's private choice. No reasonable observer is likely to draw from the facts before us an inference that the State itself is endorsing a religious practice or belief." *Rosenberger*, 515 U.S. at 848, 115 S.Ct. at 2556 (citing *Witters v. Washington Dept. of Servs. for Blind*, 474 U.S. 481, 493, 106 S.Ct. 748, 755 (1986)) (O'Connor, J., concurring in part and concurring in judgment).

B. Selective Prohibition of Aid to Religious Schools Sends a Message of Disfavor Prohibited by the Establishment Clause.

Far from preserving government neutrality, the Sixth Circuit's selective prohibition of aid to religious schools constitutes an impermissible expression of official disfavor. As Justice O'Connor stated in pointed's *Lynch*, such disapproval sends the message that the Program's participants are "outsiders, not full members of the . . . community." Such selective exclusion is not "neutrality" toward religion, but "hostility." *Lynch*, 465 U.S. at 673, 15 S.Ct. at 1359 (O'Connor, J., concurring). The Court rejected a similar selective prohibition in *Rosenberger*.

> [G]overnment regulation may not favor one speaker over another. . . . Discrimination against speech because of its message is presumed to be unconstitutional. . . . When the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. . . . Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

515 U.S. at 829, 115 S.Ct. at 2516 (emphasis added).

It is difficult to imagine a more hostile message than that communicated by a government which provides funding for students to choose schools complying with viewpoint-neutral educational criteria, yet specifically prohibits choosing religious schools. Such discrimination, whether by the Sixth Circuit, a state university, or any other governmental entity, clearly "targets" religion for specific disfavor and is unconstitutional.

II. THE CLEVELAND PROGRAM DOES NOT HAVE THE PRIMARY EFFECT OF ADVANCING RELIGION.

A. Justice O'Connor's Deciding Concurrence in *Mitchell v. Helms* Reaffirmed the Constitutionality of the "Private Choice" Mechanism Approved in *Witters* and *Zobrest*.

Citing *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990 (1977), the Sixth Circuit claimed that it followed Justice O'Connor's narrower concurrence announced in *Mitchell*, 530 U.S. at 836. *Simmons-Harris*, 234 F.3d at 957. It read the Justice's opinion to say that cases should be decided on "factual similarity" to other precedents. It then announced that *Committee for Public Education v. Nyquist*, 413 U.S. 756, 93 S.Ct. 2995 (1973) was most factually similar to this case because both cases considered roughly the same percentage of religious schools participating in the program in question.

The Sixth Circuit's characterization of Justice O'Connor's concurrence is grossly misleading. The program at issue in *Mitchell* provided aid directly to religious schools on a "per capita" basis. The plurality held that such aid was permissible so long as it was equally available regardless of religious viewpoint - to the "religious, irreligious, and areligious . . . . alike." 530 U.S. at 809, 120 S.Ct. at 2541.

Justice O'Connor 's factual distinction was addressed to the plurality's reliance on *Witters* and *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 113 S.Ct. 2462 (1993). Justice O'Connor stated that unlike the "per capita" aid in *Mitchell*, the aid in those cases went to the individual recipient or parents, who in turn decided which school to attend - *exactly* the mechanism employed by the Ohio legislature in this case.

> Specifically, we decided *Witters* and *Zobrest* on the understanding that the aid was provided directly to the individual student who, in turn, made the choice of where to put that aid to use. See *Witters*, 474 U.S., at 488, 106 S.Ct. 748; *Zobrest*, 509 U.S., at 10, 12, 113 S.Ct. 2462. Accordingly, our approval of the aid in both cases relied to a significant extent on the fact that "[a]ny aid . . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Witters, supra*, at 487, 106 S.Ct. 748; see *Zobrest, supra*, at 10, 113 S.Ct. 2462 ("[A] government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents"). This characteristic of both programs made them less like a direct subsidy, which would be impermissible under the Establishment Clause, and more akin to the government issuing a paycheck to an employee who, in turn, donates a portion of that check to a religious institution. See, *e.g., Witters, supra*, at 486-487, 106 S.Ct. 748; see also *Rosenberger, supra*, at 848, 115 S.Ct. 2510 (O'CONNOR, J., concurring) (discussing *Witters*).

Mitchell, 530 U.S. at 841, 120 S.Ct. at 2558.

The Sixth Circuit's "factual" distinction is even more disingenuous because in *Mitchell*, a total of 46 schools participated, of which 41, or 89%, were religiously affiliated. *Id.*, 530 U.S. at 803, 120 C.Ct. at 2538. That percentage is, of course, higher than the percentage of religious schools in *either Nyquist* or this case.

The court then reasoned that because 82% percent of the schools in the Cleveland Program were religious, parents did not have a "genuinely independent and private choices of aid recipients." *Simmons-Harris*, 234 F.3d at 955. Again, the court was wrong. Neither *Witters*, *Zobrest*, *Allen*, nor any other "private decision" cases have held that the percentage of students attending religious school "trumps"individual choice.

In fact, the Supreme Court has explicitly rejected these irrational results. "We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Agostini*, 521 U.S.203, 230, 2117 S.Ct. 1997, 2013 (citing *Mueller v. Allen*, 463 U.S. 388, 401, 103 S.Ct. 3062, 3070 (1983)).

Further, the court arbitrarily restricted its consideration of the range of educational options in this case. Program participants obviously still have the option to attend public schools free or charge to them. Their choices to attend community schools or public schools outside the district are no different now than they were before the Program was passed. The Program's only effect is to *add* more educational options - not limit them.

Students' cost to continue attending Cleveland public schools or community schools is exactly what it was before - "$0.00." And accepting the Sixth Circuit's conclusion that the Ohio legislature set the Program scholarship amounts equal to tuition charged by parochial schools, *Simmons-Harris*, 234 F.3d at 959, the cost to Program students to attend religious schools is likewise "$0.00." Thus, there is absolutely no net economic incentive or disincentive to choose the Program schools vis-a-vis the students' other choices.

B. Excluding Religious schools Under Program of Generally Available Aid Is Unconstitutional.

So long as the "private choice" mechanism noted by Justice O'Connor is present, an aid program is constitutional if it provides religiously neutral eligibility criteria and making benefits "available to both religious and secular beneficiaries on a nondiscriminatory basis." *Agostini*, 521 U.S. at 232,117 S.Ct. at 2014.

Unquestionably, the Scholarship Program complies with these requirements. Yet the Sixth Circuit invalidated the Program by scrutinizing the religious nature of the Program beneficiaries' choices in direct contradiction to the requirement that government must remain religiously neutral.

Such a result is not only unconstitutional, but is ultimately irrational. The result of a"maximum percentage" is "cosmic hot potato," rendering aid programs constitutionally deficient during periods of religious ascendance when enrollment in religious schools is relatively higher, but finding them perfectly acceptable during periods of religious decline when enrollment is relatively lower.

C. The Sixth Circuit's Percentage Test Is Unconstitutional and Irrational.

The Sixth Circuit found it dispositive that nonsectarian schools did not participate in the Program because religious schools provided education at lower cost.

> The school voucher program is not neutral in that it discourages the participation by schools not funded by religious institutions, and the Cleveland program limits the schools to which a parent can apply the voucher funds to those within the program. Practically speaking, the tuition restrictions mandated by the statute limit the ability of nonsectarian schools to participate in the program, as religious schools often have lower overhead costs, supplemental income from private donations, and consequently lower tuition needs.

Simmons-Harris, 234 F.3d at 959. A "reasonable observer" could conclude from these statements that religious groups, far from subverting the constitutional, are instead the only groups providing education for the poor to any meaningful degree.

In the rational world of *Zorach*, in which religions prosper based on the zeal of their adherents, willingness to give and

sacrifice to help the poor is a boon, not a bane. It is hardly a shock that in programs designed to help the poor, the poor end up choosing the religious providers who for years have been the only ones willing to do just that. It is perverse to declare a program unconstitutional because religious schools accomplish more efficiently the very objectives the program is trying to encourage - education for the poor.

That a particular percentage of Program beneficiaries choose religious over public or non-sectarian schools simply reflects the overall preferences of the class of the beneficiaries and the competitive efficiency of the religious schools. Voiding the Program because many potential beneficiaries are religious penalizes them for having successfully exercised the very right which *Zorach* protects -- the right to flourish based on their zeal and the attraction of their religious teaching!

CONCLUSION

The Court should affirm the Cleveland Program because it satisfies the basic requirements acknowledged by at least six justices in *Mitchell*: (1) the qualification criteria are religiously neutral and (2) religious schools receive Program funds, if any, only as a function of the independent choices of parents and students. Finally, the Court should specifically note that the Sixth Circuit's selective discrimination against religious schools and viewpoints offends the Constitution.

Respectfully submitted,

VERMONTERS FOR BETTER EDUCATION
By: MICHAEL D. DEAN
Dean & McKoy, S.C.
20975 Swenson Drive, St.125
Waukesha, WI 53186
(262) 798-8044

November 9, 2001